

BATES, EDWARD

DRAWER 103

CABINET

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Abraham Lincoln's Cabinet

Edward Bates

Excerpts from newspapers and other
sources

From the files of the
Lincoln Financial Foundation Collection

125'

Attorney General's Office,
Washington, March 4, 1863

To the President

Honored Sir,

I have heard that
the bill to reorganize the Courts
of the District of Columbia, has
become a law, & consequently,
that you will have to appoint
four judges.

Please pardon me for making
the suggestion that the appointment
involves matters of great delicacy &
importance, which deserve
the most serious consideration.

I will wait upon you to speak
~~of that matter~~, as soon as I think
you are a little recovered from
the severe pressure of the last

few days.

BATES, Edward, Atty-Gen. ALS, 2pp, Svo.
Atty-Gen. Oct 1863. To President Lincoln
regarding the appointment of judges in the
District of Columbia.

PAUL C. RICHARDS
AUTOGRAPHS
49 VILLAGE DRIVE
BRIDGEWATER, MASS. 02324

few days, to speak upon that subject - to make known the desire, of some influential persons, in the District, to state some of my own views.

Most respectfully,
In your obt-serv

Dr. Bates

Remarkable Letter from a Cabinet Officer.

Among the autographs which were contained in the book of autographs, disposed of at the Sanitary Commission Fair, in Brooklyn, was one of Attorney General Bates, which ought to be written in letters of gold. Such sound principle and noble sentiments, coming from the very Cabinet of Mr. Lincoln, may well astonish the reader. The doctrine is pure Democratic doctrine, and that is the doctrine of the fathers, and of all the great and good men the country has produced. Would that the President himself had been possessed of some of the sound sense which characterizes these remarks of Mr. Bates! The country would have exhibited a different scene to-day if Mr. Lincoln had not been one of the men who "think themselves so much wiser than the fathers were."

Mr. Bates' letter is eloquent. It will reach a great many hearts. We venture to believe that it will hereafter be remembered by the historian who writes of our times, as a pathetic and eloquent exclamation, in the midst of impending ruin, from one who remembers and laments the old glory, while he sees himself immediately surrounded by the instruments of the national destruction.

But we cannot expect reform and return to sound principles until good men like Mr. Bates open their eyes to the true character of the party, and the men with whom they are associated, and come out boldly and nobly for the old Union and the old Constitution. When Mr. Bates leads the way, who will refuse to follow?

WASHINGTON CITY, Feb. 2, 1864.

To —

MADAM: Being confined to my sick room, I have an opportunity, which neither my public office nor the court room affords, to acknowledge your note of Jan. 30, written in behalf of the Brooklyn and Long Island Fair, and in aid of the Sanitary Commission.

You ask for an autograph unconditionally, and for a sentiment, "if agreeable." Now, my dear lady, an autograph is a cheap thing and can be easily furnished, whether sick or well; but a sentiment is quite another affair, and does not sort very well with the nauseous physic which I am required to take to-day.

Nevertheless, the cause being so good, and withal its advocate a lady (to which high authority I habitually bow), I must strain every point and try to give you something sentimental, but not of the sickly kind.

I am beginning to grow old, and am a very old-fashioned man; for in spite of the rushing current of new opinions, I still believe that we once had good old times, good old principles, and good old men to profess them, and act them out, and a good Constitution worthy to be preserved to the latest posterity.

In fact, I begin to suspect myself to be little or nothing better than an *old fogey*; for I can't help believing, with Jackson, that the Constitutional Union of the States *must* be preserved; and I still have undoubting faith in Washington when he warns us that we cannot preserve our free institutions without a frequent recurrence to the first principles of our government.

That is my sentiment, Madam. I fear it is growing very unpopular, but I can't help that. God knows that I would help it if I could, for I have little hope of improvement from the efforts of men who fancy themselves so much wiser than their fathers were, and so much better than the laws which they made for our good.

With love for your cause, and respect for yourself, I remain,

Your obedient servant,

EDW'D. BATES.

176.3

up and built upon, and the Atlantic Club will play on
the Union grounds next season. *Globe Jan 3, '73*

THE FUNERAL SERVICES of the late Edward C. Bates were held in the South Congregational Church on Union Park street, of which the deceased was formerly a member, at 12 o'clock yesterday, Rev. Edward Everett Hale, the pastor, officiating. The services were opened by the singing of "Watchman, tell us of the night," by the regular church choir. A brief prayer was offered by Mr. Hale, after which the choir sang the hymn-chant entitled "The Lord is my Shepherd." Selections of Scripture were then read by the reverend gentleman, this being followed by prayer. The services were then closed by the singing of "Thy will be done."

The funeral services of the late Edward W. Rowland, of the firm of Ishurgh & Rowland, took place from his home, 462 Shawmut avenue, yesterday afternoon. He was 48 years old and leaves a wife but no children.

The obsequies of the late George H. Cooke of Wollaston, will be held this afternoon, at half-past three o'clock, at No. 20 Yarmouth street, in this city.

LINCOLN LORE

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FORT WAYNE, INDIANA

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EDWARD BATES — ATTORNEY GENERAL

The River and Harbor Convention which assembled at Chicago on July 5, 6, and 7, 1847, not only introduced Abraham Lincoln to eastern politicians but it also raised Edward Bates to an exalted position. For the next two decades he was to be known as the outstanding statesman west of the Mississippi River. The sponsor of the convention having lived in Buffalo and Chicago having been selected for the place of meeting it seemed wise to give the western river interests a prominent place in the convention arrangements, and Edward Bates of St. Louis was appointed as its chairman.

It was here that Abraham Lincoln first met Bates and also here that Horace Greeley became impressed with Bates' ability. Possibly Bates' candidacy for the presidential nomination in 1860, supported by Greeley, had its beginning here, and certainly Lincoln's decision to place Bates in the cabinet rested on certain episodes which found their origins at Chicago.

It would seem timely in relation to the series of sketches featuring Lincoln's cabinet members now running in Lincoln Lore to center our interests this month in Edward Bates, who became Lincoln's Attorney General in 1861.

It is not generally known that Bates kept a diary. This literary accomplishment in the Cabinet has usually been associated with Welles. It was not until 1933 that through the sponsorship of the American Historical Society the Government Printing Office brought from the press in one volume *The Diary of Edward Bates 1859-1866* while the Welles three volume work was published in 1911. From this diary edited by Howard K. Beale, most of the information about Bates' selection for the cabinet is found.

President Lincoln planned to visit Mr. Bates at St. Louis on Thursday, December 13, 1860, and sent a message to Bates advising that he would come to see him on the following day to consult with him "about some points connected with the formation of his cabinet." Mr. Bates however, states, "I thought I saw an unfitness in his coming to me, and that I ought to go to him." Accordingly, Mr. Bates made an appointment with Mr. Lincoln for the following Saturday. Two conferences were arranged, one in Lincoln's office in the morning and another in Mr. Bates' room in the afternoon.

Bates in reporting the conference notes, "He (Lincoln) assured me that from the time of his nomination his determination was, in case of success, to invite me into the Cabinet." When the question arose as to which portfolio Bates was to fill it did not seem possible for the President to make any positive assignment but according to Bates' conclusion: "I must be either Secretary of State or Attorney

coln about the method of procedure. On December 18 Bates wrote Mr. Lincoln that his St. Louis friends thought that his connection with the administration should be made public but that the particular cabinet post need not be mentioned. A letter bearing the same date written by Mr. Lincoln to Bates follows.

(Confidential)

Springfield, Illinois,
December 18, 1860

My dear Sir: Yours of to-day is just received. Let a little editorial appear in the "Missouri Democrat" in about these words:

"We have the permission of both Mr. Lincoln and Mr. Bates to say that the latter will be offered, and will accept, a place in the new cabinet, subject, of course, to the action of the Senate. It is not yet definitely settled which department will be assigned to Mr. Bates."

Let it go just as above, or with any modifications which may seem proper to you.

Yours very truly,
A. Lincoln

On December 30 Bates again visited Springfield to confer with the President elect and had a casual meeting with Mr. Lincoln that evening in General Cameron's room at the hotel. The next day during both the morning and the afternoon Bates was in conference with the President elect and returned to St. Louis that night.

Bates arrived in Washington on Thursday, February 28, on March 5th was nominated and confirmed as Attorney General and on March 6th was inducted into office, the oath being administered by Judge Nelson of the Supreme Court.

Bates was the oldest member of the Cabinet and he often referred to himself as an "old Fogey" Whig. One of his biographers states that his "sole reliance in his earthly course were God, the law, and the Constitution." He was consistently conservative in practically all of his observations.

In submitting his resignation to Lincoln on Nov. 24, 1864 he continued: "I gladly seize the occasion to repeat the expression of my gratitude, not only for your good opinion which led to my appointment, but also for your unvarying courtesy and kindness during the whole time we have been associated in the public service."

General." It develops from Bates' notes that he was the only man among many prospects for the Cabinet positions "to whom he (the President) has yet spoken or written a word about their appointment."

The question about giving publicity to the appointment was introduced and it was so left that after Bates' return home he could advise Mr. Lin-

ment made under Butler's original order) and on the legal effect of Abraham Lincoln's proclamation of amnesty than on Butler's own administration. Despite Butler's belief that the assessment was not collected after his departure, this letter and others indicate that Order No. 55 was renewed. Historians seem to be in doubt, however, about how much was actually collected.

It is also true that Major-General Hurlbut's (his name was misspelled by Mr. Touro) General Order No. 144 can be found in the *Official Records of the War of the Rebellion*. This order renewed Butler's assessment against those who had subscribed to the committee of safety. Attached to the order was a schedule of names of contributors, the amount they contributed to aid the defense of New Orleans before the Federal take-over, and the amount they were assessed for the fund for the relief of the poor (the latter was a certain percentage of the former). Gone from Hurlbut's order, however, was the schedule of names of cotton factors who requested planters not to bring their cotton to New Orleans. There is no explanation given in the order for the exclusion of this group, but doubtless the ability of the cotton factors to pay anything was much diminished by 1864 because of the strangulation of commerce caused by the naval blockade and the Federal occupation of New Orleans. It would no longer have been a case of taxing those ablest to pay. At the time, Butler had been replaced by General Banks, but Banks was temporarily away from the Department and General Hurlbut had been left in command by Banks. The name Giquel appears in the schedule of contributors to the committee of safety in both General Orders No. 55 and No. 144. It appears as "Giquel and Jamison," a firm, apparently, which had contributed \$7,500 to the committee of safety and which was assessed \$1,875 for the poor-relief fund. The name of John Touro appears once in Roy P. Basler, *The Collected Works of Abraham Lincoln* (New Brunswick: Rutgers University Press, 1953). Governor Michael Hahn of Louisiana sent a letter to Secretary of War Edwin M. Stanton on August 9, 1864. This letter introduced Touro, who was presenting claims for supplies taken from New Orleans citizens by the United States Army. Lincoln begged off dealing with the problem on August 12. Apparently Touro stayed around Washington to press other claims made by Louisiana citizens.

The claim referred to in the letter to Lincoln acquired by the Library and Museum is based on the contention that taking the oath of amnesty exempted residents of former Confederate territory from Federal martial law and thus from Hurlbut's Order No. 144. Lincoln's Proclamation of Amnesty and Reconstruction of December 8, 1863 offered a pardon to participants in rebellion and restoration of their property rights (with the exception of slave property) if they subscribed to an oath to the Constitution and the Union. They also had to swear to obey Congressional acts and Presidential proclamations affecting slaves. Seemingly, this would exempt oath-takers from arbitrary martial law, but since Congress controlled the recognition of their own membership, a State could gain no recognition in Congress without Congress's approval. The question of what laws governing property the oath-taker *would* be under was simply a chaos. The United States Constitution did not anticipate a civil war, and the question of what conditions had to be met for a state to resume its normal relations with the federal government would vex the President and Congress until 1877. The outcome of this petition (it is not endorsed by Lincoln) is as yet unknown, and the fate of Mr. Giquel and Touro's other petitioners was just one part of the complex legal and political problems that constituted the era of Reconstruction.

A FURTHER NOTE ON WHITING'S WAR POWERS

In the May, 1973 issue of *Lincoln Lore* (Number 1623), space did not permit discussion of two questions that bear on the article entitled "I like Mr. Whiting very much..." The first is a problem suggested by David Donald in his article "Abraham Lincoln: Whig in the White House" (in Donald's *Lincoln Reconsidered: Essays on the Civil War Era* [New York: Random House,

1956]). Donald contends that Lincoln's rather expansive view of the war powers of the President of the United States was a legacy of his twenty-year identification with the Whig party in politics. His arguments rests on two points, both of which are relevant to the previous discussion of Lincoln and Solicitor Whiting: (1) Whiting was a former Whig, and (2) the President's power to abolish slavery as a war measure had been enunciated by John Quincy Adams, who had been an opponent of Andrew Jackson and the Democratic party.

Whereas a powerful case can be made for the influence of the Whig party's ideology on Lincoln's economic ideas, Donald's case for its influence on Lincoln's constitutional view of the war powers of the executive is unconvincing. If William Whiting was a former Whig, so also was Lincoln's Attorney General, Edward Bates of Missouri. Bates was as persistent a Whig as Lincoln, remaining impervious to the beckoning of the new Republican party at least as late as 1856, when he served as president of the Whig national convention held in Baltimore. Yet his constitutional views fell a good deal short of Whiting's and Lincoln's. Bates differed with Lincoln on the question of admitting West Virginia to the Union, equating its removal from Virginia as itself a form of secession. Although he at first upheld the President's suspension of *habeas corpus*, by 1863 he feared "a general and growing disposition of the military, wherever stationed, to engross all power." Likewise, Bates never questioned the President's power to emancipate slaves as a war measure, but the following observation made by Bates during the war was precisely opposite in spirit to William Whiting's work:

Surely Cicero was right when he said that "in every Civil war, Success is dangerous, because it is sure to beget arrogance and a disregard of the *laws of the Government*—" (i.e. the Constitution) [.]

These men, flattered with a little success, have opened up to themselves a boundless source [sic] of power. When the constitution fails them, they have only to say "this is a time of war—and war gives all needed powers"!

I am afraid that this Congress is becoming perfectly Radical and revolutionary.

Whiggery by no means led Bates to Whiting's views.

Moreover, as Donald himself admits, John Quincy Adams was not a Whig. When he was elected to Congress in 1831 and returned for eight successive terms, former President Adams ran without specific support from any party in Massachusetts.

More illuminating is some of the information provided by Donald W. Riddle's study of Lincoln's single term in the House of Representatives (*Congressman Abraham Lincoln* [Urbana: University of Illinois Press, 1957]). While serving in Congress, Lincoln had a chance to express an opinion on two of the precedents cited by William Whiting as proof that war even in the United States had meant extraordinary governmental powers over property in slaves.

Lincoln acted differently in each case. When a private bill came up to provide compensation to the owner of a slave abducted by the British during the War of 1812, Lincoln voted for it. Later a bill was proposed to pay compensation to the heirs of one Antonio Pacheco. Pacheco's slave had been hired by the United States Army as a guide and interpreter in the interminable Seminole wars. The slave was captured by the Indians. When Pacheco claimed him later, the Army said that the slave had cooperated with the Indians after he was captured by them and that therefore he must be transported out of the state with the vanquished Indians. Pacheco then sought compensation for the loss of his slave. Anti-slavery Congressmen contended that no compensation should be voted on the grounds that there was no such thing as property in another man. Lincoln voted that payment should not be made to Pacheco, voting with the majority and taking the floor to make sure his vote was properly recorded. Later the bill was reconsidered. Lincoln voted against the move to reconsider, and he voted against the bill again when it was reconsidered (although this time he was in the minority).





Lincoln Lore

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Mary Jane Hubler, Editorial Assistant. Published each month by the
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BROWNING'S PECULIAR TURN TO THE RIGHT

Those who keep diaries often influence the writing of history far more than they influenced events in their own day. Gideon Welles occupied a position in Lincoln's Cabinet inferior to William H. Seward's and Edwin M. Stanton's, but his sourly independent diary wrecked the reputations of dozens of Washington politicians. One reason the Radical Republicans have fared so poorly in historical writing is that most of the prominent diarists around Lincoln hated them. Welles, John Hay, and Edward Bates saw them as "Jacobins," but there is little evidence that the President saw the Radicals the same way. Salmon P. Chase, whose diary might have balanced the picture over the years, never had the influence on historical writing that the conservatives had, because he did not as clearly admire Lincoln as they did. Criticizing Abraham Lincoln has never been a good way to gain the trust of historians.

The other great diarist near the Lincoln administration, Orville Hickman Browning, was also a Radical-hater. His erratic and ultimately inexplicable political course during the Civil War reveals the danger in relying too heavily on diaries, which may reflect peculiar political positions.

Browning was never much of a "Lincoln man." He had hoped that Edward Bates would be the Republican nominee for President in 1860. However, the Illinois delegation, of which Browning was a member, was pledged to Lincoln, and Browning worked for Lincoln's nomination at the convention. Even after the nomination, Browning thought that "we have made a mistake in the selection of candidates." His assistance in getting Bates to support the Republican ticket proved vital, but Browning had little luck in recommending Cabinet appointments. He wanted to see Bates become Secretary of State and Joseph Holt, Secretary of War. Browning's was one of many voices raised against Norman B. Judd's inclusion in Lincoln's official family.

Browning exercised his greatest influence on the Lincoln

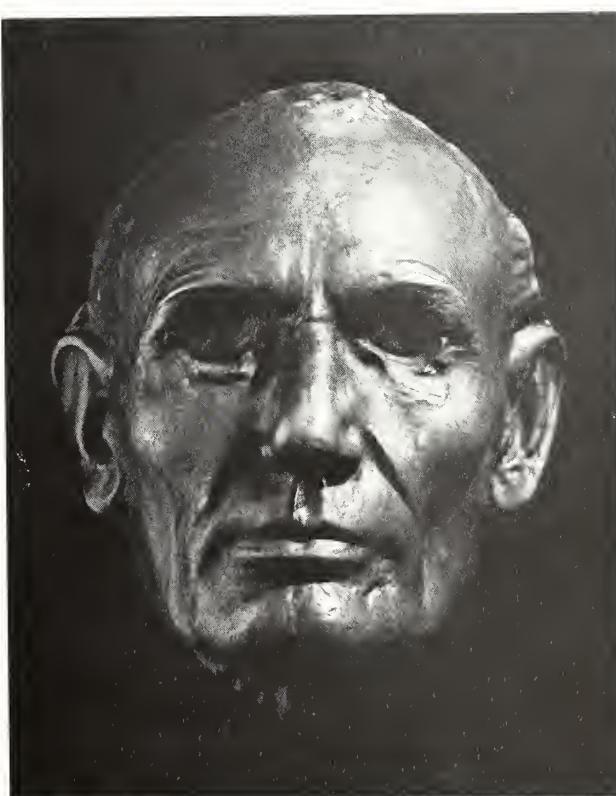
administration when he read a draft of the First Inaugural Address and suggested removing a provocative threat to "reclaim the public property and places which have fallen" in the seceded states. Browning's reasoning has often been taken as Lincoln's. He admitted that Lincoln's draft was right in principle without altering the threat to "reclaim" federal property, but, Browning explained,

In any conflict which may ensue between the government and the seceding States, it is very important that the traitors shall be the aggressors, and that they are kept constantly and palpably in the wrong.

The first attempt that is made to furnish supplies or reinforcements to Sumter will induce aggression by South Carolina, and then the government will stand justified, before the entire country, in repelling that aggression, and retaking the forts.

After Fort Sumter fell, Browning imputed his own reasoning to Lincoln. "Upon looking into the laws," he told the President on April 18, "which clothe you with power to act in this emergency, I am not sure that you expected, or desired any other result."

Browning was a conservative by nature, but war brought out a radical streak in him. If Baltimore stood in the way of troops coming to protect Washington, he told Lincoln, it should be "laid in ruin." Before April was over, he thought it likely that slaves would flock to the Union armies and inevitably "rise in rebellion." "The time is not yet," he added, "but it will come when it will be necessary for you to march an army into the South, and proclaim freedom to the slaves." Browning celebrated General John C. Frémont's proclamation freeing the slaves of rebels in Missouri in the late summer of 1861, and he thought the President wrong to revoke it. Frémont's proclamation did "not deal with citizens at all," Browning remonstrated, "but with public enemies." Citing precedents in international law, he insisted that war abolished society and



From the Louis A. Warren
Lincoln Library and Museum

FIGURE 1. Browning recalled that sculptor Leonard W. Volk had worked in a marble yard in Quincy, Illinois, Browning's home. Lincoln's friend thought Volk's bust of Stephen A. Douglas "decidedly a work of genius." Volk is better known for his famous life mask of Lincoln. Dr. O. Gerald Trigg allowed the Louis A. Warren Lincoln Library and Museum to photograph his superb bronze casting of the mask with the striking result above. For more information on the mask and on Volk's famous castings of Lincoln's hands, turn to the second article in this issue of *Lincoln Lore*.

gave "liberty to use violence *in infinitum*." "All their property," Browning said, "is subject to be . . . confiscated, and disposed of absolutely and forever by the belligerent power, without any reference whatever to the laws of society." Lincoln disagreed sharply.

After the death of Senator Stephen A. Douglas in June of 1861, Governor Richard Yates appointed Browning to finish his term. In the Senate, Browning defended the administration's arbitrary arrests and voted for the First Confiscation Act. He voted to emancipate slaves in the District of Columbia.

After April of 1862, Browning turned suddenly to the right. He opposed the Second Confiscation Act and urged Lincoln to veto it. It was a test "whether he [Lincoln] was to control the abolitionists and Radicals or whether they were to control him." He praised Lincoln's letter in answer to Horace Greeley's "Prayer of Twenty Millions" for emancipation, and he bitterly opposed the Emancipation Proclamation that fall. Browning was campaigning for Congressional candidates in Illinois when he heard it had been issued, and he practically stopped in his tracks. He slowed down his campaigning, and he twice pleaded with Lincoln to alter the Proclamation.

There is no explanation for the suddenness of Browning's change. In principle the Emancipation Proclamation was little different from Frémont's proclamation, and Browning had quarreled with Lincoln for revoking that. Lincoln's assault on slavery seemed to be legitimate by the very precedents in international law which Browning had called to Lincoln's attention. The Illinois Senator was disappointed that the President had not appointed him to the United States Supreme Court. He wanted the job so badly that he wrote Lincoln a somewhat embarrassed letter asking for it outright, admitting that it was "an office peculiarly adapted to my tastes." By the spring of 1862, Lincoln still had not filled the position, and many thought Browning was still in the running. Lincoln did not decide to appoint David Davis until July, and Browning had already turned to the right by that time.

Politically, Browning became increasingly disaffected from the administration. There was much doubt by 1864 that he would support Lincoln's reelection. Browning told a friend in September that he had "never . . . been able to persuade myself that he [Lincoln] was big enough for his position." No one knows how he voted in November. Browning's Civil War politics are an enigma to this day.



*From the Louis A. Warren
Lincoln Library and Museum*

FIGURE 2. Orville Hickman Browning remained personally friendly to Lincoln even after their political disagreements. Gustave Koerner, a fellow Illinois Republican, always remembered Browning's "conspicuous . . . ruffled shirt and large cuffs." Their relations were pleasant enough, but Koerner would "have liked him better if he had been a little less conscious of his own superiority."

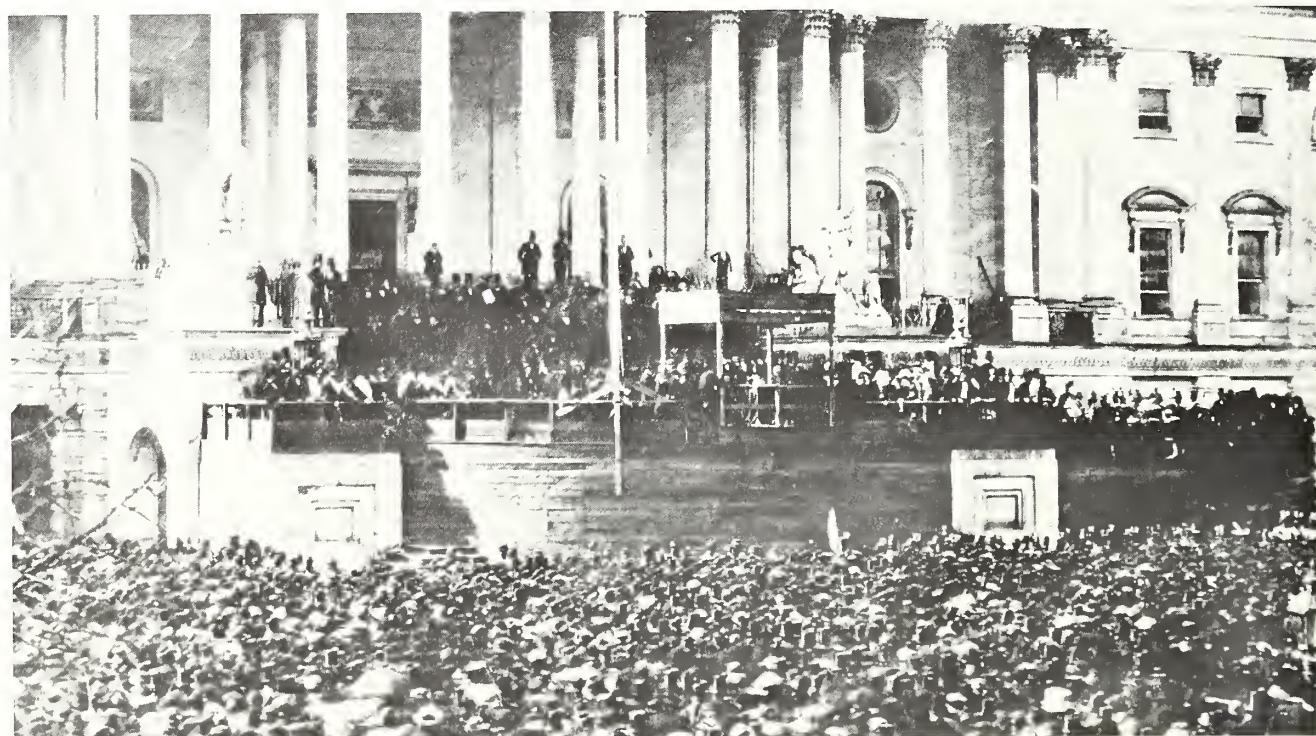


FIGURE 3. Lincoln's first inauguration.

*From the Louis A. Warren
Lincoln Library and Museum*

THE BERCHEM CONNECTION

When Dr. O. Gerald Trigg found the superb casting of Leonard Volk's life mask of Lincoln now in his possession (see *Lincoln Lore* Number 1701), he also discovered a crucial aspect of the history of Volk's famous mask, the role of Jules Berchem. Berchem was a Frenchman, born in Grenoble in 1855. Volk's junior by twenty-seven years, Berchem was indentured to learn bronze work six years after Volk made his original plaster mask of Lincoln. The young Frenchman came to America in 1882 and established his own foundry three years later. Volk's son sold the original mask in 1886, but, sometime after Berchem's arrival in this country, Volk lent the original mask to the French foundry-man. Dr. Trigg's mask was in all likelihood cast before 1886 and is, therefore, the oldest extant bronze copy.

It occurred to Dr. Trigg that Berchem probably also made bronze copies of Volk's castings of Lincoln's hands. By discovering the Berchem connection, he was able to conduct

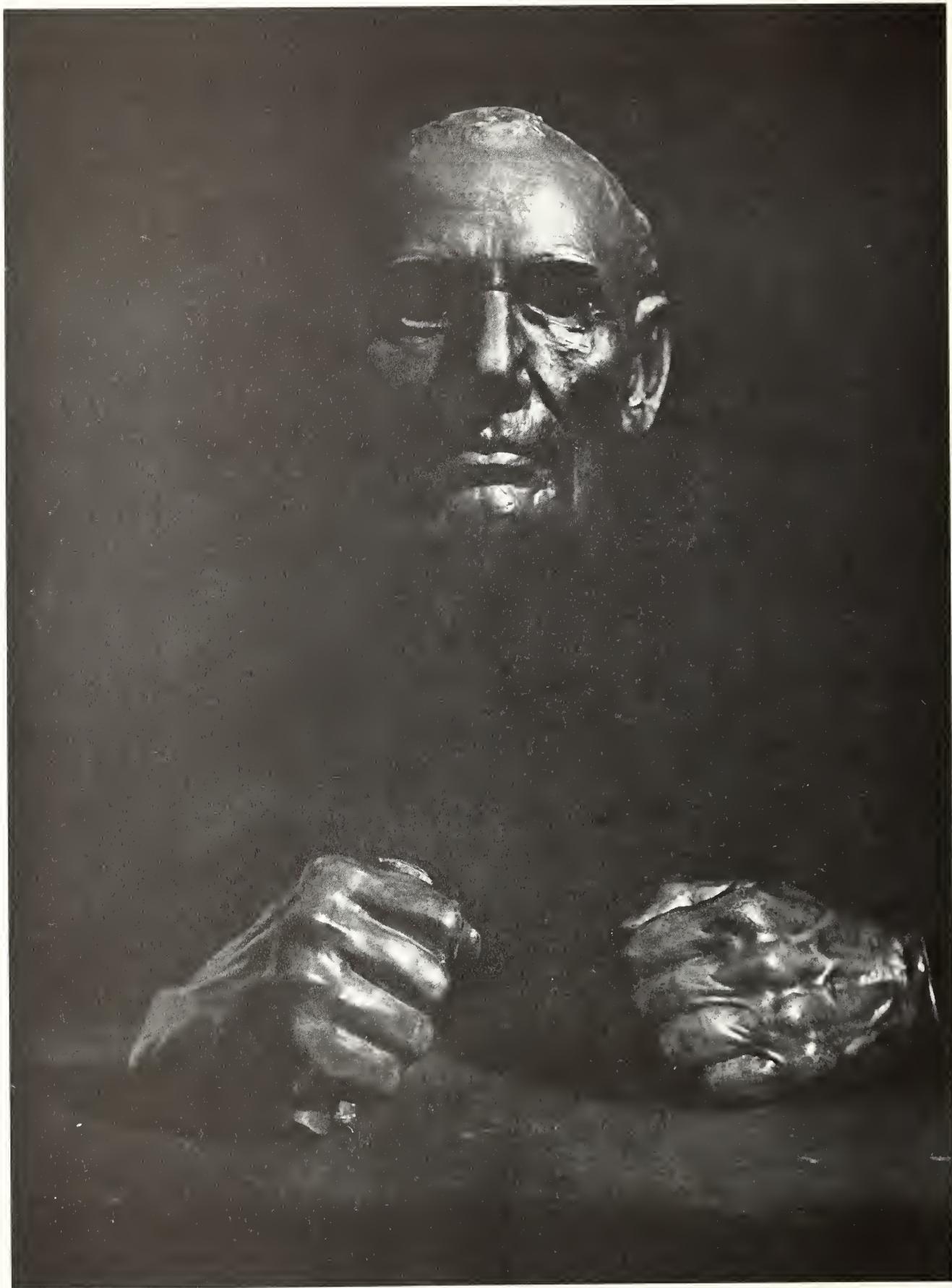
an intelligent search for the hands that surely existed somewhere. Contacts with Berchem's descendants soon bore fruit, and Reverend Trigg now owns bronze castings of the hands as well. Like the mask, the right hand has an "M" on it, probably designating it as a master copy.

The massive bronze fists are important artifacts, peculiarly revealing of characteristics that do not show in Lincoln's face. The right hand is conspicuously different from the left because it is swollen and puffy from handshaking. These are the hands of a politician. These are the hands, too, of a healthy man. They show the results of a youth spent grappling with the wilderness: robust strength. They also give the lie to the sensational, but rather silly, theories that Lincoln suffered from Marfan's Syndrome. Doctors call this congenital disease "arachnodactyly," a name derived from the spidery fingers of the disease's victims. Many descriptions of these fists would be apt, but "spidery" is not among them.



*From the Louis A. Warren
Lincoln Library and Museum*

FIGURE 4. The right hand of the Trigg bronze castings bears an inscription similar to the one on the bottom of the mask. It also bears an "M" at the base of Lincoln's thumb like the one in the ear of the mask. At Volk's request, Lincoln held a stick in his right hand, part of a broom handle which Lincoln himself cut for the casting. Volk made plaster casts of Lincoln's hands the day after the official committee came to Lincoln's home to notify him of his nomination for the Presidency. "The committee," Volk remembered, "and the vast crowd following passed in at the front door, and made their exit through the kitchen door in the rear, Mr. Lincoln giving them all a hearty shake of the hand as they passed him in the parlor."



*From the Louis A. Warren
Lincoln Library and Museum*

FIGURE 5. The Trigg mask and hands.

Lincoln Lore

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Table of Contents

"Institutions are not made, they grow:"

Attorney General Bates and
Attorney President Lincoln
By Frank J. Williams

2

Franklin D. Roosevelt and Abraham
Lincoln: Competing Perspectives
on Two Great Presidencies

**Review by
Harold Holzer**

16

The Young Eagle; The Rise
of Abraham Lincoln

**Review by
Sarah Joan Ankeney**

18

Lincoln Lore

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Editor:

Sara Gabbard

Vice President and Director of Development

Contributors:

Joan L. Flinspach, President/CEO

Carolyn Texley, Director of Collections/Archivist



THE
LINCOLN
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The Life and Legacy of Abraham Lincoln

For subscription information, contact The Lincoln Museum

200 E. Berry Street, P. O. Box 7838

Fort Wayne, Indiana 46801-7838

(260) 455-3864 Fax: (260) 455-6922

email:TheLincolnMuseum@LNC.com

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"Institutions are not made, they grow:"*

Attorney General Bates and Attorney President Lincoln

By Frank J. Williams, Chief Justice of the Rhode Island Supreme Court

The R. Gerald McMurtry Lecture

The Lincoln Museum

Fort Wayne, IN

September 23, 2000

British philosopher Isaiah Berlin created the metaphor of the hedgehog and the fox. The fox is plenty smart, knows a lot, but is diffuse and unfocused. On the other hand, the hedgehog is slow, methodical, and concentrates on only one overriding issue at a time.

Historian James McPherson argued that Abraham Lincoln was a hedgehog, in fact "one of the foremost hedgehogs in American history."¹ Though McPherson used the difference to separate Lincoln from the political foxes who opposed him, the analogy can be extended to help understand the President's relationship with his onetime political rival for the presidency and eventual Cabinet member, Attorney General Edward Bates. The key to understanding Lincoln's hedgehog mentality lies in realizing that he was both politician *and* attorney. When viewing the major constitutional issues during the Civil War, it may be proper to conclude that Bates was more of a hedgehog than just a political fox.

There were similarities between the attorney president and his attorney general.

Both were born in Southern states, Bates in Virginia and Lincoln in Kentucky.

Both served in the military — and both for only a brief time. In February 1813, Bates joined a volunteer militia company to assist in repelling a threatened attack on Norfolk during the War of 1812. His service mirrored that of Lincoln in the Black Hawk

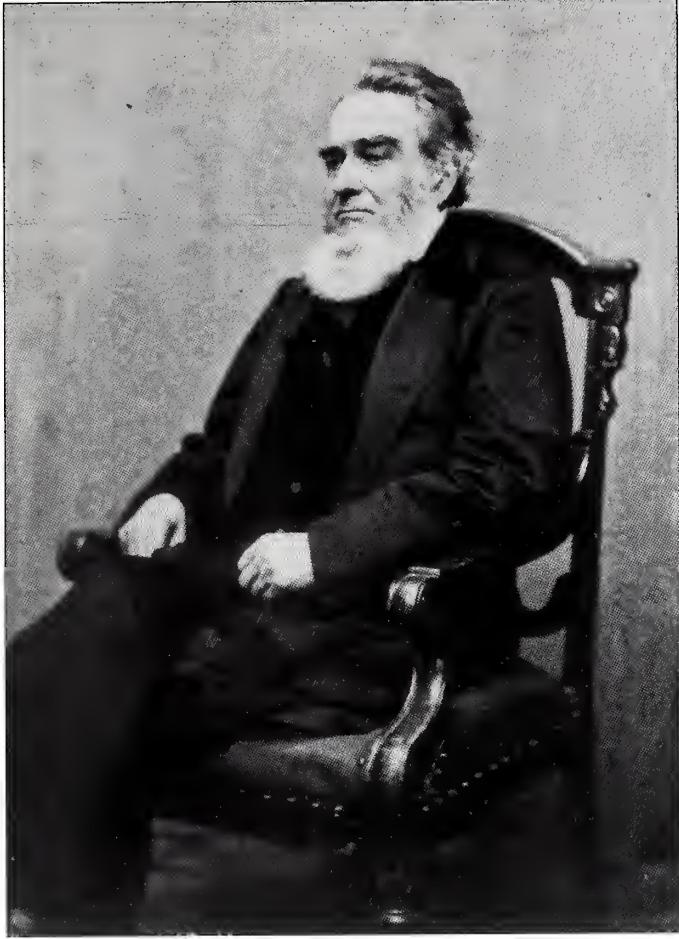
War in 1832, which lasted for eight months. Lincoln was elected Captain of his militia company and reenlisted for two three-month stints as a private.

Both men studied law. Both served one term in the Congress; Bates from 1826 to 1828 and Lincoln from 1846 to 1848. And both served in their state legislatures: Bates in the Missouri Senate and House of Representatives and Lincoln in the Illinois House of Representatives. Both attended the River and Harbor Improvement Convention which met at Chicago, where Bates served as President. Both Abraham Lincoln and Edward Bates were Whig leaders. They favored economic development and were considered moderate on slavery. Both opposed the Lecompton Constitution and repeal of the Missouri Compromise. And in 1860, both Bates and Lincoln sought the Republican presidential nomination.

There were dissimilarities too. The obvious one was that Bates, born in 1793, was sixteen years older than Lincoln. Lincoln, who was self-taught, could not match the early education of Bates, who was taught to read and write by his father and at the age of ten placed under the tutorship of a cousin in Hanover, Virginia. He then entered Charlotte Hall Academy in St. Mary's County, Maryland. Lincoln attended "blab" schools for less than a year. The lean, muscular Lincoln was six feet, four inches in height, the pudgy Bates, nine inches shorter at five feet, seven. Politically, Bates was

*Edward Bates to Francis Lieber, October 8, 1864, Francis Lieber Papers, Huntington Library, San Marino, CA

On the Cover: *Lincoln and His Cabinet: With General Grant in the Council Chamber of the Whitehouse* Lithograph (Thomas Kelly, New York, 1866) Attorney General Bates is seated at far right, which is perhaps appropriate since he was the most conservative member of President Lincoln's cabinet. (TLM #3750)



Mathew B. Brady, photographer, [Edward Bates]. New York, 1861. Carte-de-visite photograph, 4 x 2.5 inches. Rarely photographed, Edward Bates posed for this widely distributed portrait when he arrived in Washington to become Lincoln's Attorney General.

All images in this issue are from the Frank and Virginia Williams Collection of Lincolniana and were photographed by Virginia Williams.

a strong Nativist and Know-Nothing while Lincoln famously wrote, "I am not a Know-Nothing. How could I be."² Eventually, Bates would become President Lincoln's most conservative advisor when he served as Lincoln's Attorney General from 1861 to 1864.

Contemporary research suggests that Bates was an insignificant figure in the Lincoln administration. He is perceived as having written legal briefs that often contradicted the Chief Executive's ideas and constitutional reasoning, although the Attorney General typically ended up endorsing him. Surprisingly, little has been written about Edward Bates. There is only one biography on him.³ On the other hand, Bates left a copious diary⁴ along with several hundred pages of his opinions as Attorney General.⁵ Moreover, he was bright enough to seek the opinion of and retain the respect of America's best constitutional scholar of the era — Francis Lieber.*

*In fact, Lieber asked Bates to write an article for a legal dictionary. Lieber to Bates, November 21, 1862, Huntington Library. Bates to Lieber, October 10, 1862, Lieber papers HEH.

Nonetheless, while remembered as a capable worker, Bates has been pigeon-holed as being "*in* but not really *of* the great historical scene of our Civil War." As John P. Frank, author of *Lincoln as a Lawyer*, believed, Bates "deserves professional respect, [but] also deserves his obscurity."⁶ In this essay, I would like to reexamine whether Bates really deserves this obscurity or whether his ultimate support for the President and Commander-in-Chief deserves reappraisal.

The 1860 Election: Lawyer-Politicians in Contention

Early in 1860, a Bates-for-President movement was launched in Missouri. His supporters contended that a Free-Soil Whig from a border state, if elected on the Republican ticket, would avert secession. The movement won the support of many leaders, particularly in the border states. But the decision of the National Republican Committee to hold the convention in Chicago, instead of St. Louis, proved a serious setback to the Bates supporters and added strength to the candidacy of Lincoln. On the first ballot Bates received only 48 votes; on the second ballot 35; and on the third and deciding ballot, only 22. Lincoln, presenting himself as the dark-horse candidate, received an increasing number of votes in each successive ballot: 102 on the first, 181 on the second and then 231 1/2 on the third ballot — one and a half votes short of a majority. Two hundred and thirty-three votes were needed for nomination. Ohio switched four votes from Salmon P. Chase to Lincoln and other delegations quickly followed, giving him a modified total of 364 out of a possible 466 votes.⁷

Bates must have been surprised by the phenomenal result for Lincoln, considering that Lincoln was not even mentioned as a likely candidate among eight Republicans in D.W. Bartlett's 1859 publication, *Presidential Candidates ... Sketches of Prominent Candidates for the Presidency in 1860*. Bates' diary, until 20 days before the Chicago Convention, makes no reference whatever to Lincoln as a candidate for the presidency.⁸

Soon after the Chicago Convention, Lincoln decided to offer Bates a Cabinet position. Some of Bates' friends suggested Secretary of State, but Lincoln felt that first place should go to William H. Seward. But the fact that Bates was a former Whig from a western border state who had presidential support at the 1860 convention forced Lincoln to take note of him, just as he moved to include most of his one-time rivals for the nomination — Seward, Simon Cameron, and Chase among them — in his official family.

After Lincoln's nomination, Orville Hickman Browning, Lincoln's friend and a one-time Bates supporter, convinced Bates to support the party's nominee. On June 11, 1860, Bates endorsed Lincoln as "a sound, safe, national man" who "could not be sectional if he tried."⁹ But he did not campaign actively. The conservative Bates approved of the conservative dimension of the president-elect.

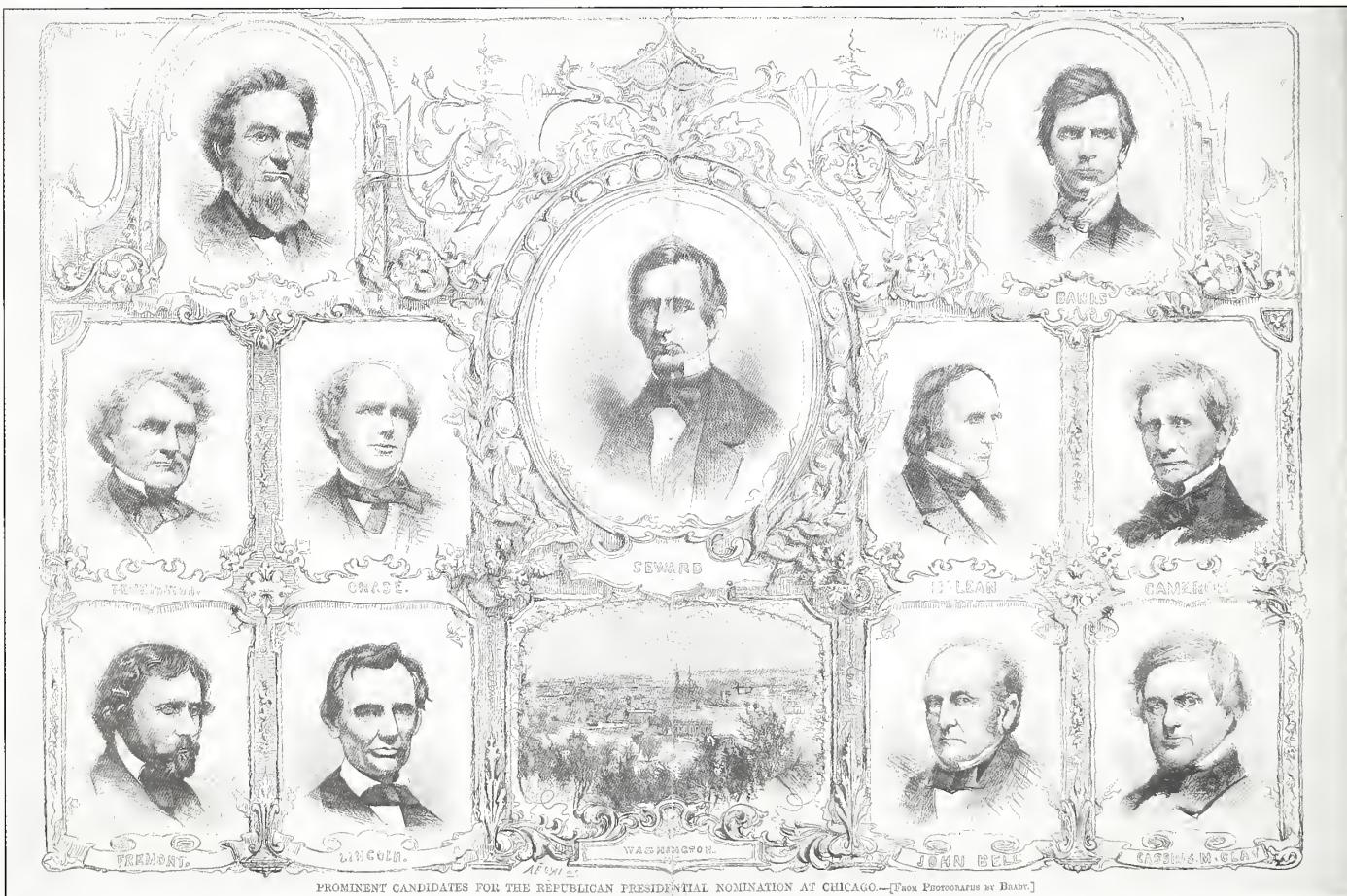
Bates was the first man upon whom Lincoln settled for the Cabinet, and the first one of the seven to whom he spoke about an appointment. "Everybody," wrote Bates in October 1860, "expects

Mr. Lincoln to offer me one of the Departments.”¹⁰ He initially expressed an unwillingness to accept because of the fear that he might be required to live beyond his means. Then comes this entry: “There is another reason touching personal ambition equally strong. I have not now to learn (for I know it already by experience) that a man may win as much reputation by refusing as by holding office. My position is anomalous. A national reputation has been forced upon me.”¹¹ The political dimension of Bates’ behavior would prove critical in Lincoln’s Cabinet. Lincoln knew what he was getting.

Early in December 1860, Lincoln sent Bates a message saying he intended to travel to St. Louis to talk with him about the formation of his Cabinet. The courteous and politically astute Bates thought it would not do for Lincoln to come to see him, but that he ought to go to Springfield. So the two men met on December 15 in Lincoln’s temporary office at the Illinois State Capitol. There, Lincoln told him that he had kept him in mind for a place in the Cabinet ever since the Chicago Convention, and that he was the first man with whom he had spoken about a Cabinet appointment, although Lincoln, ever the cagey operator, had in fact written to Seward about the Cabinet a week earlier.¹²

At a meeting on December 15, Lincoln offered Bates an unspecified Cabinet post. Lincoln assured Bates that he regarded his participation in the administration as “essential to its complete success.”¹³ Other than Secretary of State, Lincoln gave Bates his choice of any other Cabinet position and the latter wisely chose that of Attorney General. It was a logical choice for the lawyer-politician Bates to serve under the lawyer-chief executive. He thus became the first Cabinet officer in American history to be chosen from the region west of the Mississippi River.

For a time it is clear that he did enjoy much influence in the Cabinet. It was at his suggestion that the Navy Department began equipping a fleet on the Mississippi River.¹⁴ During the tense *Trent Affair*, he urged that the question of legal rights be waived and that every effort be made to avert a war with Great Britain.¹⁵ He did differ with Lincoln on the question of the admission of West Virginia to the Union. As Attorney General, he filed an elaborate opinion in which he contended that the West Virginia government represented and governed but a portion of the State of Virginia and that the movement for separate statehood was “a mere abuse, nothing less than attempted secession, hardly veiled under the flimsy forms of law.”¹⁶ But Lincoln too had doubts about



Artist unknown, *Prominent Candidates for the Republican Presidential Nomination at Chicago* – [from photographs by Brady]. New York, May 12, 1860. Wood engraving from *Harper's Weekly*. Based on photographs by Mathew Brady, this woodcut from the North's leading news weekly offered engravings of those mentioned for the Republican Party nomination. Included was Edward Bates of Missouri, along with a beardless Abraham Lincoln of Illinois. At the Wigwam in Chicago, Bates received 48 votes on the first ballot, 35 on the second ballot and on the third and deciding ballot, only 22. Lincoln, on the other hand, received an increasing number of votes in each successive ballot, winning the nomination on the third ballot with 364 votes.

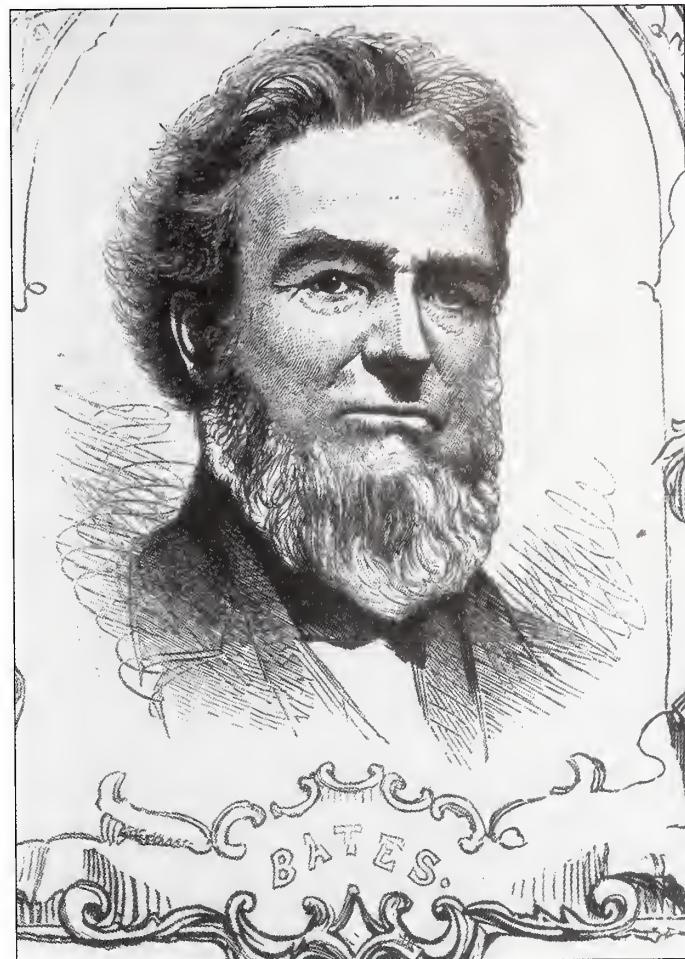
carving one state from another, as it conflicted with Lincoln's unwavering belief in the illegality of secession. But politics, including Union sympathy in the western counties of Virginia, ruled this day. Rather than undermining Bates' influence, his position on this matter must have confirmed Lincoln's faith in the Attorney General as a loyal conservative.

Yet from this time, Bates' influence in the Cabinet gradually waned after he disagreed with many of the administration's military policies, worrying that as the war progressed, constitutional rights were giving way to the encroachments of military authorities. He felt that Lincoln lacked the will power to end what Bates considered abuses by Secretary of War Stanton, Seward and their minions. He resented the interference of Seward in matters which he felt rightly belonged to the Attorney General's office. He had little confidence in the Secretary of State, Secretary of War and the Secretary of the Treasury. Yet Bates' dissatisfaction with his position is typical of modern Cabinet secretaries since most seldom serve longer than a couple of years in office.

Bates' conception of the presidency was ahead of his time. He thought the President should undertake the big acts of national leadership and avoid wasting time on minor matters. Again and again, he urged Lincoln to actively operate as the Commander-in-Chief of the Army. "The *General-in-Chief* — or *Chief General* — is your only lieutenant ... to command under you," he told Lincoln.¹⁷ He conceived of the President as an officer giving general directions, and dismissing the unsuccessful or the disobedient. He never doubted Lincoln's character or purposes; but on occasion remained troubled as to whether Lincoln would use "the *power to command*."¹⁸ This view of presidential authority is in direct contrast to Chief Justice Roger B. Taney, a former U.S. Attorney General who was serving in Washington as Chief Justice with growing disloyalty.

Bates saw the need to protect presidential time. For example, when someone appealed a \$130 claim from the Secretary of Interior to the White House, Bates told Lincoln to leave it alone; undoubtedly the President had the power to alter the result, but "the President has enough to occupy his time and attention without devoting them to the work of auditing private claims."¹⁹ Even when a state appealed to Lincoln to decide a particular matter which an Interior Department official was handling unduly slowly, Bates advised Lincoln to discharge the laggard rather than wasting the President's time to decide the claim himself.²⁰ It was, as Bates saw it, the duty of the President to see to it that the laws are faithfully executed, not to execute them himself.²¹

Bates viewed a president's position as powerful, under the law. He told Lincoln both what he could and could not do. Indeed, his response was negative more often than positive. The flavor of this relationship is reflected in Bates' very first opinion on April 18, 1861, when he informed the President that he could not, without legislation, reorganize the War Department to set up a separate division of militia with E.E. Ellsworth in charge.²² The last sentence of his last opinion, on November 21, 1864, was "being thus clearly of the opinion that you have no power in the premises, I deem it unnecessary to make any remarks on the merits of the present application."²³ Aside from upholding the *habeas corpus* suspension, the blockade, and the Emancipation Proclamation — and these



Detail: Bates portrait from the May 12, 1860 *Harper's Weekly*

were the most important issues confronting the Administration — there are no significant instances of Bates telling the President what he *could* do. Yet, even if he was an internal naysayer, he remained a loyalist to the President and the Union.

Department of Attorney General

The role of Attorney General in 1861 was a limited job, even if it was one of the four original Cabinet positions. Presidents typically chose their Attorney General with care, but a Department of Justice with a professional staff was still a decade away. Bates was limited to a staff of six, including clerks and messengers. His functions were to give opinions invited by the President or department heads, and to handle government litigation in the Supreme Court. He had no real authority over the United States Attorneys; they were responsible only to the President, who in turn proved too busy to pay much attention to them. The pay and perquisites of the Judiciary Department and the government law offices were largely in the hands of the Interior Department. Most government claims largely rested in the Treasury Department. In these circumstances, no one made much of the office. Most Attorneys General before Bates, who was the twenty-sixth, have been utterly lost to history.²⁴ The few great advocates, like Reverdy Johnson and Jeremiah S. Black, left a mark, but Bates was no courtroom lawyer, and he farmed out most of his Supreme Court work.



Artist unknown, *President Lincoln And His Cabinet In Council At The White House – Members Demonstrating To The President The Importance Of The Evacuation Of Ft. Sumter*. New York, March 30, 1861. Wood engraving from *Frank Leslie's Illustrated Newspaper*. This woodcut is the first portrait of the Lincoln Cabinet. From the inability to distinguish the faces of Cabinet members, it is apparent that the artist used poetic license in depicting them. Attorney General Bates could either be the person shown fifth from the left or seated at the President's right. While Bates would not hold Ft. Sumter if it meant war, he did not favor evacuation but relief of the fort on the oceanside to avoid conflict.

Yet the Attorney General always provided two crucial functions for the President: he was an important political adviser, and he could legitimize the actions of the President. There was also the duty of writing opinions. This opinion-writing function is now usually handled by a relatively subordinate member of the top team of the Department of Justice, and while on occasion it has tremendous significance when controversial decisions are prematurely leaked, those occasions are infrequent. Bates retained the opinion-writing functions. Though often of little significance, all presidents see it as occasionally important.

The marginal importance of opinion-writing then is seen in the fact that when Bates did not do the work, nobody did it; and the country did not have to call off the War as a result. There was a period when Bates did little or nothing for several months and the opinion work simply piled up; a response to Secretary Welles on March 4, 1864, for example, defensively apologizes that the opinion had been pending for three and a half months and a few days later Bates made a similar apology to the President for a two-month delay.²⁵ The delays did not seem to matter very much.

Nonetheless, he did have a specialized and occasionally important legal job. His 154 opinions, as published in two volumes of the *Opinions of the Attorney General*, amount to a second public diary. His more familiar private diary is largely a record of political and personal life; while the legal diary records his intellectual and professional life. Nothing of the sort would be written today, when the Opinions of the Attorney General are largely a bureaucratic output of the Department of Justice. But in Bates' day, an Attorney General had no one else to do his chores, and unlike today, the opinions were a prime job. The resultant product is pure Bates, and a measure of the man.

The opinions may be classified in different ways since the categories overlap. However, the following table suggests the scope of Bates' work.

Classification of Opinions of Attorney General Bates, 1861–1864

Routine administration	77
Claims	30
Scope and general powers of the President	14
Blockade, prize, international	10
Procurement duties	9
Scope of Attorney General's office	8
Citizenship and slavery	5
Other	1

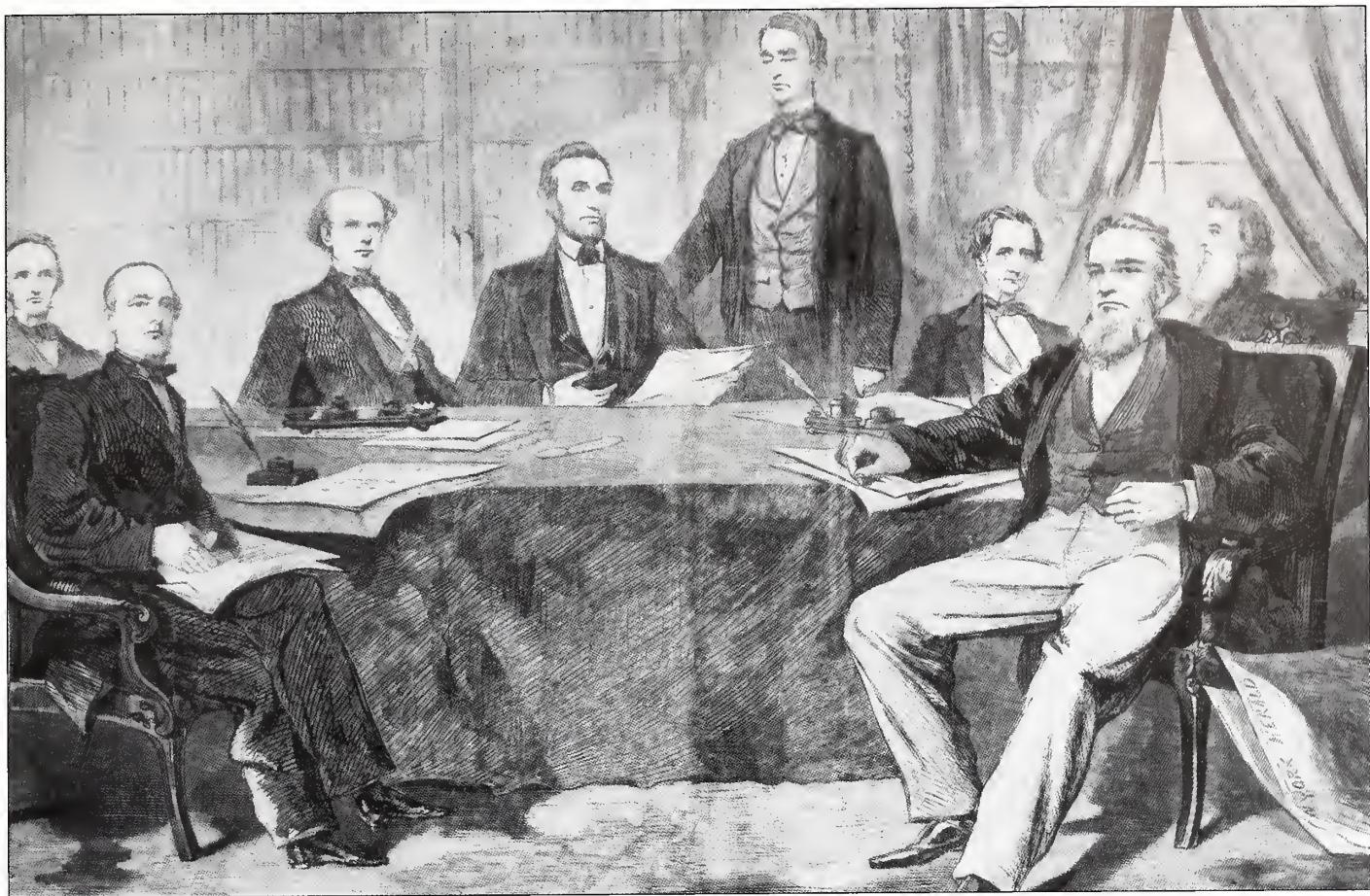
154

These opinions cover the breadth of the legal field. His most challenging moment came when he advised the President on the power to suspend the writ of *habeas corpus*.²⁶ On the other hand, he also had to decide whether the bride of Aaron Burr's declining years, having divorced him before Burr's death, was entitled to a Revolutionary War widow's pension.²⁷ It also fell to Bates to determine (in two separate opinions) first, that franked mail did not require a hand-written inscription by the sender — some appropriate stamp or seal would do; and second, that the authorized official had to apply that stamp or seal with his own hand, and could not delegate the task of getting out the mail to an assistant.²⁸ The broad coverage of these opinions as indicated earlier must have impressed Francis Lieber, one of the nation's most important constitutional scholars and political theorists.

The Role of the Attorney General: Political and Legal Functions

Like any opinion-giver, the Attorney General needs to determine his own jurisdiction. He was, he knew, not a court of last resort: even another Cabinet member could overrule him. As he told Gideon Welles, when the Navy Secretary asked for his "decision," "pardon my criticism of the last word in your letter. You refer the matter for my 'decision.' I beg to state that the Attorney General has no power to *decide* a question of law. He can only give his *opinions*, to aid, as far as he can, the judgment of his coordinate departments."²⁹ Bates was never unaware that he was only a part of the President's administration.

Moreover, when a given matter either was in court or might promptly go there, Bates usually declined to give any opinion at all. When the United States District Judge and the United States Attorney in Minnesota had a difference of view as to whether Minnesota, having become a state, the Federal Court retained



Artist unknown, New York, July 13, 1861. Wood engraving from *Harper's Weekly*. A more accurate portrayal of the Cabinet members and President Lincoln and his administration appears in this woodcut. Attorney General Bates is shown second from right. There were many similarities between the President and his attorney general. Both were born in southern states, both served in the military for a brief time, both studied law and both served one term in the Congress. Both were Whig leaders and both attended the River and Harbor Improvement Convention in Chicago, where Bates served as President.

jurisdiction over certain Indian trade cases, Bates told them to litigate it. The District Attorney could bring a case where he thought it ought to be, and if dissatisfied with the result, appeal; as Bates put it bluntly, it was not the Executive Department's job "to correct the errors of, or furnish legal assistance for, the courts of the United States, or of the State of Minnesota."³⁰ As Bates correctly understood it, "the Attorney General has nothing to do with civil suits to which the United States was a party, or with criminal prosecutions in a court, until they reach the Supreme Court of the United States," even if they were of "immense magnitude."³¹

Bates restrained himself to advising the President and the department heads when they had a course of action before them; he would not give general advice or express general legal views on other problems. This restrictive view was sometimes rigorously applied, so that when the Secretary of Interior wished to know whether the Baltimore & Ohio Railroad could, with the assent of the City of Washington, put horse-car tracks into the city, Bates declined to respond since, in his view, the Secretary of Interior lacked power to do anything about the matter. He rarely succumbed to the temptation of dictum, though he did just that when he declined to express an opinion to Secretary Seward on the cor-

rectness of a Florida District Judge in a prize case. The matter however was urgent, and Bates said:

*"It is not for me to sit in judgment upon the legal proceedings in that particular, and determine whether Judge Marvin did right or wrong in awarding costs. For I understand that it is the settled practice in Prize Courts for the judge to award costs, for or against the claimant, at discretion. The books abound with cases in which the rule is assumed and acted upon by the courts."*³²

Bates' primary function in the Cabinet depended on his usefulness to the President. And here one finds evidence that his conservative, yet loyal, support could prove important.

Suspension of the Writ of Habeas Corpus

At the dawn of the Civil War, in both official and private circles, our national designation, The United States of America, was still referred to in the plural: "they," rather than "it." For many citizens, loyalty to their state came first; loyalty to the United States was derivative from state loyalty. While it was not generally argued that the Constitution gave the right to secede, friends of the South denied that the Constitution created an obligation not to secede.

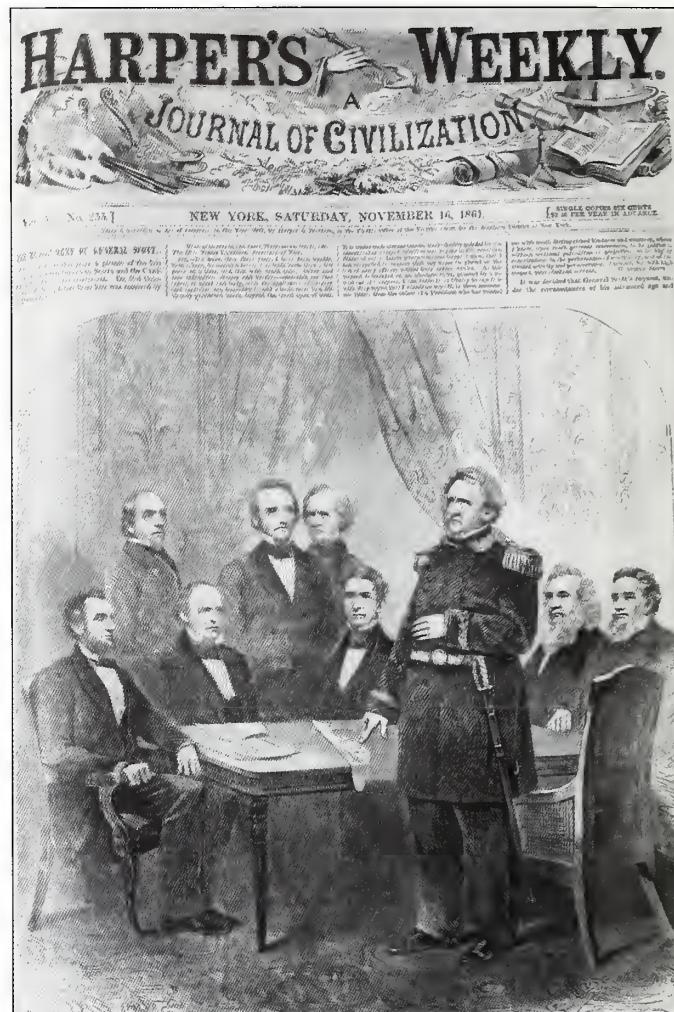
They suffered no feeling of guilt in urging that the seceding states be permitted to leave the Union without interference, or even enjoining Southern forces to fight for the "right" of Southern states to attain their own independence.

To counteract this position, the federal government yielded to necessity and resorted at times to rather ruthless repression. Under the suspension of the writ of *habeas corpus*, men deemed dangerous to the Union cause were arrested and, without necessarily being charged with any offense and without a trial, were held in military prisons. Petitioners applied to the President and to military leaders rather than to the courts. So great indeed was the scope of executive power, and so limited the power of the courts, that by the end of the war much of the deference ordinarily accorded to the judiciary was accorded elsewhere — not, it is true, to executive and military subordinates, but to the looming figure of the President, Abraham Lincoln.

Until mid-February 1862, when it was given to the Secretary of War, the power to direct military arrests was in the hands of the Secretary of State, William H. Seward. Simon Cameron, Lincoln's first Secretary of War, was not a strong or effective leader. Although the Office of Attorney General had been expanding, it was not until the Act of August 6, 1861, that the Attorney General was given superintendence of the work of United States attorneys and Marshals.³³ Attorney General Bates, although in many respects able, was a mild-mannered and conservative politician from a badly divided border state. As he fought back when Seward issued instructions to the United States Marshals and attorneys, it is not surprising that he made no attempt to acquire military jurisdiction or that he constantly resisted military encroachment on civil jurisdiction. Seward, on the other hand, was self-confident and inclined to reach out for power. His attitude was reflected in a boastful statement, said to have been made to Lord Lyons in negotiations with the British government:

My Lord, I can touch a bell in my right hand and order the imprisonment of a citizen of Ohio; I can touch a bell again and order the imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do so much?³⁴

From the time of the Baltimore riot of April 19, 1861, when the Sixth Massachusetts Infantry was attacked by a pro-secession mob, and railroad bridges over which troops and supplies might be brought from the North were burned the next day, it was obvious to Union leaders that the protection of Washington and the containment of the Confederacy required the establishment of effective Union control in Maryland. It is clear that someone somewhere feared that dissident Marylanders might seek to use the federal courts to defeat Union strategy. In any event, without giving it publicity, President Lincoln on April 27, 1861, issued an order to Commanding General Winfield Scott to enable him to cope with judicial interference, a document which began: "You are engaged in repressing an insurrection against the laws of the United States." If at any point between Philadelphia and Washington the General found resistance such that it was necessary to suspend the writ of *habeas corpus* for the public safety, the General himself or the local commanding officer was authorized to suspend the writ.³⁵



Artist unknown. New York, November 16, 1861. Wood engraving from *Harper's Weekly*. This woodcut shows President Lincoln and his Cabinet, including Bates (far right), with retiring Major General Winfield Scott. While many regard Bates as an insignificant figure in the Lincoln administration, he did, as the most conservative member of the Cabinet, balance Lincoln's ideas and Constitutional reasoning. He usually ended up endorsing the President's policies. He never achieved the prominence of other members of the administration and never had his portrait on the cover of either *Harper's Weekly* or *Frank Leslie's Illustrated Newspaper* — the most popular news weeklies of the period.

John Merryman of Maryland, who spoke out vigorously in favor of the South and recruited a company of soldiers for the Confederate Army, became the focal point for a legal conflict between the President and the Chief Justice of the United States, Roger Taney. The latter, of course, was a judicial activist who proceeded over the years from *Dred Scott* to open disloyalty to the Union. Merryman was arrested in May and lodged in Fort McHenry, Baltimore. Shortly after Merryman's arrest, his counsel sought a writ of *habeas corpus* from Taney alleging that Merryman was being illegally held. Taney issued a writ to the Fort Commander, General George Cadwalader, directing him to produce Merryman before the court. Cadwalader refused on the ground that the President had authorized the suspension of the writ. To Taney, this was blasphemy and he immediately issued an attachment for Cadwalader for

contempt. The Marshal could not enter the fort to serve the attachment and the Chief Justice wrote his opinion in *ex parte Merryman*.³⁶

The Chief Justice vigorously defended the power of Congress alone to suspend the writ. The Chief took this position in part because permissible suspension in cases of rebellion, appears in Article I, Section 9 of the Constitution, describing Congressional duties. He ignored the fact that it was placed there by the Committee on Drafting at the Constitutional Convention in 1787 as a matter of form, not substance. Nowhere did he acknowledge that a rebellion was in progress, and that the fate of the nation was, in fact, at stake.³⁷ Taney missed the crucial point made in the draft of Lincoln's report to Congress on July 4:

*[T]he whole of the laws which I was sworn to [execute] were being resisted ... in nearly one-third of the states. Must I have allowed them to finally fail of execution? ... Are all the laws but one to go unexecuted, and the government itself go to pieces, less that one be violated?*³⁸

This was Lincoln, as both lawyer and politician, at his best.

Lincoln, in need of support for his order to General Scott, asked his Attorney General the following questions:

1. *In the present time of great and dangerous insurrection, has the President the discretionary power to cause to be arrested persons known to have criminal intercourse with the insurgents?*
2. *In such cases of arrest, is the President justified in refusing to obey a writ of habeas corpus issued by a court or judge, requiring him to produce the body of the prisoner?*³⁹

The responses helped steel the administration to wage the battle for suspension. In answer to the first question, Bates wrote: "All the other officers of the Government are required to swear only to 'support the Constitution' while the President must swear to 'preserve, protect, and defend it.' ... It [this power of arrest of suspected persons] is said to be dangerous in the hands of an ambitious and wicked President, because he may use it for the purposes of oppression and tyranny. Yes, certainly, it is dangerous — all power is dangerous — and for the all-prevailing reason that all power is liable to abuse." In answer to the second question, as to the right to ignore a writ of *habeas corpus*, Bates cited the Constitution, Article VII, Section 9, Clause II: "The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion, the public safety may require it." Although the Constitution is silent as to who may suspend *habeas corpus*, whether Congress or the executive, Bates was certain that the President is the one who may suspend it: "The power to do those things is in the hands of the President, placed there by the Constitution And for any breach of trust he is responsible before the high court of impeachment, and before no other human tribunal."⁴⁰

Contrary to the 1803 *Marbury v. Madison* decision, Bates argued importantly that the Constitution established three independently sovereign coordinate branches of government and the judiciary

could not impede the executive's means of suppressing insurrections. Bates personally disliked the suspension but thought it preferable to martial law. Though he remained in awe of Chief Justice Taney's reputation throughout his tenure in office, Bates saw through Taney's regressiveness. But Whiggish Bates could appreciate the one-time Federalist who increasingly became a one-issue Democrat. He was the only member of the Cabinet to attend Taney's burial in 1864.

Bates has been criticized for giving what many perceive to be a tepid response or justification for Lincoln's suspension of the writ. John Frank considered Bates' opinion his "only intellectual failure." Yet, even Frank concedes that "Probably no one else could have done much better." Frank takes the view that the power to



Artist unknown. New York, October 29, 1864. Wood engraving from *Harper's Weekly*. This woodcut of Chief Justice Roger B. Taney is based on a photograph by Mathew B. Brady. Taney died on October 12, 1864, at the age of 87. While Bates respected the Chief Justice (he was the only Cabinet member to attend Taney's funeral), the Attorney General disagreed with many of the opinions written by the Chief Justice — most notably *Dred Scott*, in which Taney, writing for a majority of the court, indicated that a black man could never become a United States citizen. Bates, in an opinion as Attorney General, effectively overruled *Dred Scott* by indicating that African Americans were citizens based on place of birth, not race.

suspend the writ is clearly a Congressional rather than an executive power and it is essentially impossible to rationalize what the President did. "His act was a political necessity in the absence of Congress, but it was a *force majeure*, not Constitutionalism."⁴¹ The best Bates could do with it was to say that while only Congress could suspend the writ, the President could "suspend the privilege of persons arrested" to make use of the writ. Bates shared with Lincoln a loose interpretation of the Constitution when it was necessary during a Civil War.⁴²

Another supporter of the suspension, William Whiting, became Solicitor of the War Department. In 1862 he compiled a brochure, *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery*, which, under the modified title, *War Powers under the Constitution of the United States (1864)*, went through forty-three editions in eight years. A sturdy nationalist, Whiting held that the Constitution of the United States gave the federal government total belligerent rights against the rebellious states. But his arguments for suspension were no stronger than those of Bates.

Harold M. Hyman in his *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* said no less. "Bates's trizonal imagery appeals strongly to Constitutional and political conservatives even among Republicans, who asserted that Civil War America was divided Constitutionally into strictly predictable and separate, though shifting, zones of law — civil, military, and marshal — of almost planetary isolation from one another."⁴³

Nonetheless, military arrests and the suspension of trial by jury during the war, however necessary they may have been, aroused the fiercest resentment and were everywhere denounced by those opposed to Lincoln and his administration. Yet time and history have not been unkind to Lincoln's approach. In the days of the Earl Warren Court, *habeas* rights expanded only to be restricted by the Warren Burger and William Rehnquist Courts and by Congress in 1996. Bates believed in the privilege of the writ of *habeas corpus* to such an extent that he opposed retaliatory measures against state judges who were issuing the writs even where the President or his surrogates had suspended the privilege.

Confiscation

How to deal with enemy property, including those held as slaves, became a major issue for Congress and the Lincoln Administration. Confiscation of enemy property took various forms. Ships unsuccessfully attempting to run the blockade were captured, taken into port, and condemned in federal courts pursuant to international law. On land, it was assumed that the armed forces operating on enemy territory might lawfully seize whatever enemy property they could use or destroy what might be of use to the enemy. But Congress demanded more.

The special session of Congress that met in the Summer of 1861 provided for the confiscation only of property used in aiding the insurrection, which was to be condemned in United States District or Circuit courts.⁴⁴ Action was to be initiated at the behest of the Attorney General, or any District Attorney, or on information from a private informer, who was to receive half the proceeds of the

property seized. Furthermore, rights to persons "held to labor or service" were to be forfeited if the labor of such persons was used in immediate aid of the armed services of the enemy.

But confiscation of mere property used in direct aid of the enemy did not satisfy people filled with growing zeal for prosecuting the war and with growing hatred for the enemy.

The Confiscation Act of July 17, 1862, commonly called the "Second Confiscation Act," was aimed at both mitigating the punishment for treason and punishing adherence to the rebellion by confiscating property.⁴⁵ It applied to the property of all civil and military officers serving under the Confederacy; the property of any person residing in the North who should assist and give aid and comfort to the rebellion; and to the property of persons "in any state" who, being engaged in the rebellion, did not reestablish their allegiance to the United States within sixty days after a proclamation of warning by the President. Slaves were to be liberated in areas occupied by the U.S. forces, and the return of fugitive slaves to rebel owners was forbidden. The condemnation and sale of property to be confiscated was to be processed in the District Courts of the United States.

Although the military seized enemy property needed for their own use, the two Confiscation Acts placed its administration in the hands of civil officers and civil courts. So lacking in uniformity were the proceedings in the several judicial districts, and so vigorous the competition of the military for jurisdiction, that the President found it expedient to lodge supervision in the hands of the Attorney General. Some have suggested that Edward Bates' conservatism helped make the Confiscation Act an unimportant part of the Union war effort. His instructions to Marshals and district attorneys stipulated that only the property of persons arrested, prosecuted, and found guilty could be seized. He put very little administrative muscle behind the seizure of rebel property.⁴⁶

But he was plagued by a small number of overburdened government lawyers. More important, federal attorneys from Bates on down never pushed confiscation prosecutions very hard because they distrusted proceedings (known as *in rem* actions) against property. Bates may have obstructed confiscation proceedings when he could. Further, during most of the war the great part of rebels' property remained untouchable in portions of the South still unoccupied by Union troops. Property confiscations conflicted with Presidential pardons and amnesty, with the uncertainty surrounding the legal nature of the war.

President Lincoln, too, objected to proceedings *in rem* and he hoped that a reasonable time would be given for the accused to appear in court. He thought that the bill's provision for forfeiture of property forever was unconstitutional. He saw it as being in effect an attainder whose punishment reached beyond the life of the guilty party. And bills of attainder were explicitly forbidden by the Constitution. Lincoln's threat to veto the bill forced Congress to pass an explanatory joint resolution forbidding any forfeiture beyond the life of the accused. Lincoln signed the bill but took the peculiar course of sending his prepared veto message to Congress to become a part of the record.⁴⁷

Very little property was ever confiscated as a result of the Act. It was widely regarded as an anti-slavery measure because of its emancipation provision for freeing the slaves of those "engaged in rebellion." But the act did little to free slaves. Lincoln did much more a few months later with his more famous Emancipation Proclamation. Besides, such is clearly not the case. The courts were the enforcement arm of the Confiscation Act through actions brought by the Attorney General and his Marshals and district attorneys, and such federal officers had no remaining jurisdiction in the rebellious South. Bates understood that the Attorney General operated within a political system. He was a force for moderation.⁴⁸

Although the Emancipation Clause was separate from the Confiscation and Treason Clauses, the Act prescribed absolutely no means of enforcement. It declared "forever free" slaves taking refuge in the lines of the army from "persons ... in rebellion," but there was no way to determine who the owners were and what their loyalties were. Lincoln claimed that no slave was ever freed by the Second Confiscation Act. The Emancipation Proclamation involved no cumbersome and impractical judicial proceedings. The army became the means of enforcement. Where it succeeded in vanquishing Confederates, slaves were freed.

Therefore, as Harold Hyman put it, "the 1861 and 1862 Confiscation Acts specified that penalties were to come into play only after federal courts brought in guilty verdicts in individual litigation. In short, Lincoln, [Bates, the Cabinet] and Republican majority in Congress did not tear themselves away from Constitutional and criminal law guidelines long antedating the Civil War. So far as procedures to determine accused disloyalists' guilt were concerned, whatever the novelty of the subject matter, except temporarily in military occupation zones, the Congress held" ... disloyalty laws were to be enforced by national courts.⁴⁹

Hyman concluded, "In almost all respects the new statutes proved to be duds."⁵⁰ And Bates concurred with Lincoln that they were legal, but limited.

Citizenship

The Civil War ultimately produced great changes in the status of northern African Americans. Some of the more important gains for civil rights during the war were made on the national level. As early as August 1, 1861, for example, the State Department ignored Chief Justice Taney's dictum in the *Dred Scott* case that a Negro could not be an American citizen, and granted a passport to an African American named Henry Highland Garnet. The passport explicitly stated that Garnet was a "citizen of the United States." In 1862 an American revenue cutter detained a vessel in the coast-wise trade because the captain was a man of color. Under the *Dred Scott* decision, blacks were not citizens and hence were not eligible to command ships flying the American Flag. Secretary of the Treasury Salmon P. Chase seized this opportunity to address a formal inquiry regarding citizenship of black men to Attorney General Edward Bates. Bates replied with a lengthy statement which repudiated the principles of the *Dred Scott* decision and affirmed that every free person born in the United States was, "at the moment of birth, *prima facie* a citizen."⁵¹

Thus, rejection of a second-class legal status for freedmen in reconstructing the South was foreshadowed by the quiet action of Lincoln's administration in recognizing the citizenship of freeborn blacks. This was a deliberate repudiation of the *Dred Scott* dictum that blacks were not citizens of the United States and had no rights as such under the Constitution. The official opinion supporting this position came in November 1862 from the most conservative member of Lincoln's Cabinet, Attorney General Edward Bates, at the request of the most radical one, Secretary of Treasury Salmon P. Chase. Although the opinion did not deal with the freed slave, the 14th Amendment would take care of those emancipated by the Emancipation Proclamation and the 13th Amendment, its logic was inconsistent with the legal recognition of any class of residents "intermediate between citizens and aliens" — whether freeborn or freedmen. According to the Attorney General, citizenship was based upon place of birth, and neither color nor race could disqualify a person from citizenship under the Constitution or the practice of nations.⁵² Thus, Edward Bates, in an opinion by the Attorney General, breathtakingly proclaimed the *Dred Scott* decision to be illegal!

How to deal with African Americans would become the Attorney General's challenge in several opinions. In what he clearly regarded as an opinion ranking with that of *habeas corpus* for importance, he had to decide whether a free-born American Negro was a "citizen" in the light of those laws which require that only citizens could engage in certain coastal shipping.

The resulting opinion, the longest Bates ever wrote, is a landmark. The *Dred Scott* case had held that a Negro was not a citizen, and so helped precipitate the Civil War. Bates put *Scott* aside as unnecessary dicta and refused to follow it. There can be in America, he said, no intermediate class between aliens and citizens; one must be one or the other. England may have "Denizens," occupants of a sort of a legal halfway house; but we do not.⁵³ After an irrelevant but pious reference to the case of St. Paul in his declaration that he was a Roman citizen, cited by Bates because "its authenticity is unquestionable,"⁵⁴ the Attorney General concluded that citizenship is a matter of where a person is born and that color has nothing at all to do with it. So far as he knew, the notion that citizenship was derivative of color was a new doctrine, and "there is not a single nation in Christendom which does not regard the new-found idea with incredulity, if not disgust."⁵⁵

The struggle in determining citizenship for free blacks ran parallel to its antecedent: emancipation and freedom.

Emancipation

The situation both at home and abroad in the summer and fall of 1862 had reached a critical stage. Lincoln, the supreme politician and party manager, realized that he could not much longer preserve Republican solidarity indispensable to success in war, without taking the forward step of emancipation. When the President, on July 22, read his first preliminary proclamation to his Cabinet, only two of his advisors gave it their wholehearted assent. The septuagenarian Edward Bates, the most conservative and "fossilized" of them all, the Virginia-born jurist who for a lifetime had held, for the most part, the opinions of his native state on the Negro, expressed

approval. Not surprisingly, he particularly liked Lincoln's recommendation for deportation of the ex-slaves. "He dreaded any step which should be taken to bring about social equality between the two races," wrote Secretary of the Navy Gideon Welles in his diary. "The effect," he said, "would be to degrade the whites without elevating the blacks. Demoralization, vice and misery would follow."⁵⁶ Secretary of War Stanton was the other Cabinet member who showed no hesitation in support of the proclamation.

An incisive quality to Bates' mind is reflected in some of these matters. For example, the preliminary Emancipation Proclamation of September 1862 is distinctly vague in its legal sources; the final Proclamation of January 1, 1863, rests clearly on the war power. This change is apparently the consequence of Bates' counsel to the President.⁵⁷

True, this unreserved support for Lincoln's Emancipation Proclamation was linked to his hope that Lincoln was more likely than Congress to provide for colonization of freed slaves.⁵⁸ Bates always opposed policies which might lead to Negro equality and particularly disliked the employment of African Americans as soldiers. But despite his prejudices, the Attorney General also delivered an opinion to the President which suggested that African American soldiers merited equal pay with whites.⁵⁹ For a time Lincoln ignored the opinion.

Bates was a firm, but not a blood-thirsty man, and his temperament proved him a valuable counselor in the Fort Pillow matter. In May 1864, when the administration learned of the Fort Pillow massacre, the Attorney General reminded the President of his earlier warning of "the great probability of such horrid results."⁶⁰ Confederate troops massacred captured Union Negro soldiers at Fort Pillow provoking intense and understandable demands in the North for retaliation. Clearly the door was opening for wholesale slaughter of prisoners, and the President sought legal advice from his Attorney General. Bates had opposed the use of Negro troops in the first place in part because he feared just such results. Yet he had cheerfully acquiesced in a contrary decision. In these circumstances, he told the President:

Every belligerent must and will choose for himself what soldiers he will employ, and having chosen, it is not a debatable question whether he shall protect, and, if need be, avenge them. It is a simple duty, the failure to perform which would be a crime and a national dishonor.⁶¹

As a practical course, he advised no general retaliation by way of promiscuous shooting of Confederate prisoners; rather he recommended that from the point of the massacre onward, any enemies captured who had individually been at Fort Pillow should themselves be executed.

By July 1, 1864, Lincoln's private secretary, John Hay, noted "that the President has sloughed off the idea of colonization."⁶² Some argue that the President was never sincere in his efforts for colonization and used it politically to soothe white fears of possible African-American migration into the North after Emancipation; yet he said nothing about it publicly after the issuance of the Emancipation Proclamation on January 1, 1863. One thing is cer-

tain: when Lincoln accepted freedmen as soldiers on January 1, 1863, he guaranteed a biracial future for the country because no President could ask a man to fight for his country and then tell him it was no longer his country. Lincoln had definitely "sloughed off" the idea by the time the Emancipation Proclamation became effective. And Bates had, wittingly or unwittingly, helped Lincoln on to that "great consummation."

The Missouri Quagmire: A Forest of Trees

The State of Missouri was the scene of widespread popular revolt, guerrilla violence, and military campaigns from the beginning of the war to its end. The complex situation in Missouri, Bates' home state, held enormous strategic importance during the Civil War because of its centrality to the Ohio, Mississippi, and Missouri River network. Lincoln's handling of Missouri shows the self-taught President learning from his mistakes and finally acting decisively when comprehending the entire political and military situation.

One example illustrates the continued collaboration between the president and his Attorney General. Both worked together to soften military rule. The Reverend Samuel McPheeters, pastor of the Pine Street Presbyterian Church in St. Louis, was an old family friend of Bates who had committed no provable disloyal act, but on the other hand, refused to proclaim his loyalty. After an interview with the minister, the President was convinced that McPheeters was, at heart, a rebel sympathizer, but so long as he committed no overt act, Lincoln did not want him punished "upon the suspicion of his secret sympathies." The military first ordered him out of St. Louis, and then, when this order was nullified by the President at Bates' instance, ordered him out of his church. This, too, after considerable time, was nullified. Bates, writing the minister "with the express permission of the President," told him to resume his preaching. Unfortunately, after taking the high ground, the President made the mistake of leaving the final decision to General Samuel Curtis. Hearing no further complaint, Lincoln supposed that his wishes had been carried out — only to learn nearly a year later that Curtis had prohibited McPheeters from preaching in his own church for "unmistakable evidence of sympathy with the rebellion." Exasperated, the President repudiated the military order, making his position explicit: "I have never interfered, nor thought of interfering as to who shall or shall not preach in any church; nor have I knowingly or believably, tolerated anyone else to so interfere by my authority." Lincoln warned General Curtis "that the U.S. Government must not ... undertake to run the churches" and ordered him to "let the churches, as such take care of themselves."⁶³ Both Lincoln and Bates understood and supported free speech.

Similarly, Lincoln approached political factions with a broader view. At Bates' urging, he replaced General Curtis, who was too partial to the Radicals, and reinstated General John Schofield, offering the new commander some hedgehog wisdom and a simple test for success: "If both factions, or neither shall abuse you, you will probably be about right. Beware of being assailed by one, and praised by the other."⁶⁴ As David Donald said, "By this test, Lincoln himself was an enormous success."⁶⁵

The Missouri Radicals came to Washington to complain about

Schofield's appointment. Informing the Radicals that he understood the causes of the chaos in Missouri as well as they did, Lincoln observed that in time of war "blood grows hot, and blood is spilled ... Confidence dies and universal suspicion reigns. Each man feels an impulse to kill his neighbor, lest he be first killed by him. Revenge and retaliation follow But this is not all. Every foul bird comes abroad, and every dirty reptile rises up. These add crime to confusion."⁶⁶

The circumstances required harsh measures to preserve order, and General Schofield had effectively carried out those measures. Bristling, the President bluntly declined to remove Schofield and stoutly announced: "I ... shall do what seems to be my duty It is my duty to hear all; but at last I must ... judge what to do, and what to forebear."⁶⁷ The Radicals went home as permanent enemies. Lincoln no longer believed that he could solve the Missouri question to anyone's satisfaction, including his own. He had, he told Bates, "no friends in Missouri."⁶⁸

Notwithstanding Lincoln's actions, Bates came to believe that Lincoln, while an admirable and conservative man, was too prone to compromise with the Radical Republicans. He opposed military rule as a replacement for civil rule, notably in a direct confrontation with General Benjamin Butler over the military government of Norfolk. Bates strongly supported loyalist Governor Pierpont of Virginia, so strongly that Butler bitterly complained to the President. It became necessary for Lincoln politely to tell Butler to take another tone. He wrote the General that "the Attorney General only needs to be known to be relieved from all questions as to loyalty and thorough devotion to the national cause."⁶⁹

Compassion

The complex relationship between the President and Attorney General also embraced the issue of mercy. Bates and the President collaborated often on the matter of pardons. While Bates firmly believed that, for political reasons, the President must not pardon the convicted slave trader Nathaniel Gordon, who was eventually hanged, he and the President frequently found reason to avoid death penalties. Lincoln, in deference to his own leniency in this regard, sometimes joked about his "chicken-hearted" Attorney General.⁷⁰

Resignation

Bates' influence was waning, but his legal research and support were crucial. Yet age was catching up with him. Lincoln's private secretaries, John Nicolay and John Hay wrote:

Before the end of 1864, Mr. Bates "grew weary, not only of the labors of his official position, but also of the rapid progress of the revolution of which he had been one of the earliest advocates. Before the war he was the most eminent of all those Whig lawyers in the South who, while standing by all the guarantees of the Constitution, still oppose the aggressions of the slave power

Although oddly devoted to the cause of freedom and emancipation, he was wedded by constitutional temperament and lifelong habit to the strictest rules of law and precedent. Every deviation

from tradition pained him inexpressively. The natural and unavoidable triumph of the radical party in St. Louis politics, and to a certain extent to those of the nation, seemed to him the herald of the trump of doom. He grew weary of it all and expressed to the President his desire for retirement. If he had not himself wished to resign, the President would probably not have suggested it.⁷¹

On November 22, 1864, Bates confided in his diary: "I shall resign — to take effect at the end of this month. As the time shortens, I feel a sensible relief, as the lifting of a burden."

But, his political ambition remained. His diary entry for November 22 reveals an undimmed, unrequited hope for higher office. "This morning, Mr. Newton told me that he had had a free conversation with the President, who if not overborne by others would gladly, make me Ch.[ief] J[ustice] — That Chase was turning every stone to get it, and several others were urged from different quarters."⁷² In the end, Chase — not Bates — got the post.

Bates' letter of resignation to President Lincoln on November 24 displayed no distress and resentment over what the Attorney General conceived to be unconstitutional procedures over civil liberties and the military superseding the civilian authorities.

Heretofore, it has not been compatible with my ideas of duty to the public and fidelity to you to leave my post of service for any private considerations, however urgent. Then the fate of the nation hung in doubt and gloom; even your own fate has identified with the nation, was a source of much anxiety. Now, on the contrary, the affairs of the Government display a brighter aspect; and to you, as head and leader of the Government, all the honor and good fortune that we hope for has come. And it seems to me under these altered circumstances that the time has come that I may without dereliction of duty, ask leave to retire to private life.

In tendering the resignation of my office of Attorney-General of the United States (which I now do) I gladly seize the occasion to repeat the expression of my gratitude, not only for your good opinion which lead to my appointment, but also for your uniform and unwavering courtesy and kindness during the whole time in which we have been associated in the public service. The memory of that kindness and personal favor I shall bear with me into private life, and hope to retain it in my heart as long as I live.⁷³

Bates' diary entry for November 30th makes clear that:

I resign my office of Atty. Genl. [of the] U.S. to take effect November 30, 1864, having served just 3 years and 3/4. Some months before [,] I made known to the President my wish to retire as soon as he should be reelected and thus, out of doubt and danger, endorsed by the nation. I remained about the office for two days longer — closing up my private affairs and in pleasant intercourse with the subordinates — all of whom seem to regret my departure, as all of them have done their best to oblige me. I part with them all with regret, and in great kindness.⁷⁴

On December 2, Bates met with the President for his "leave-taking." He recalled that "the President's manner was affable and

kind. At parting, he took me aside and said he would write to me soon at St. Louis.”⁷⁵ Yet three weeks later, Bates had not yet heard from Lincoln.

On February 25, 1863, Bates noted in his diary that Mr. Newton “took me aside to say *he must* have a talk with me, but not now — saying only that he just had a long private talk with the P.[resident] partly about me — That the P.[resident] assured him that he had full and unabated confidence in Me.”⁷⁶ Still, in the end Lincoln retained a high regard for his long-time Attorney General.

Photographs and prints of Bates show him as short and stocky, “solid and dull,” as he said of his Pastor’s sermon in St. Louis. When Francis B. Carpenter was at work on his painting of the Cabinet group, *The First Reading of the Emancipation Proclamation Before the Cabinet*, Bates told the artist that genius and talent are rarely found combined in one individual. He defined them as follows: “genius conceives; talent executes.” Continuing, he said: “Mr. Lincoln comes very near being a perfect man, according to my ideal of manhood”⁷⁷ Most have seen fit to adopt the appraisal of Lincoln made by his Attorney General rather than the less favorable opinion of most of Bates’ colleagues in the Cabinet. “Solid and dull” Bates may have been; but it was this solid, dull man who came the nearest to history’s verdict about Abraham Lincoln, and in many ways, helped, however ploddingly, to assure it.

On April 15, Bates learned of the death of President Lincoln and wrote:

I shall abstain from all ostentacious [sic] display of exuberant emotion, for besides a deep sense of the calamity which the nation has sustained, my private feelings are deeply moved by the sudden murder of my chief with and under whom I have served the country, through many difficult and trying scenes, and always with mutual sentiments of respect and friendship.

*I mourn his fall, both for the country and for myself.*⁷⁸

On January 6, 1865, a Radical constitutional convention assembled in St. Louis and drew up a new state Constitution for Missouri. It also passed an ordinance emancipating the slaves in an ouster ordinance, the intention of which was to place the state judiciary in the hands of the Radicals. Bates fought the radicals by publishing a series of newspaper articles in which he pleaded for a government of law instead of a government of force. This struggle against the Missouri radicals proved his last great political contest. A few months after his return to Missouri his health began to break. It steadily declined until his death on March 25, 1869. The one-time lawyer, politician and former Attorney General had died battling extremists in his adopted state, just as his hedgehog mentor fought extremists on his road to the presidency. If Bates was a lesser hedgehog than Lincoln, neither of them was a mere fox.

Endnotes

- 1 James M. McPherson, “The Hedgehog and the Foxes” in *Abraham Lincoln and the Second American Revolution* (New York: Oxford University Press, 1991), 113–14.
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- 3 Marvin R. Cain, *Lincoln’s Attorney General Edward Bates of Missouri* (Columbia: University of Missouri Press, 1965).
- 4 Howard K. Beale, ed., *The Diary of Edward Bates, 1859–1866* (Washington: United States Government Printing Office, 1933).
- 5 J. Hubley Ashton, *Official Opinions of The Attorneys General of the United States*, Vols. X & XI (Washington, W.H. & O.H. Morrison, 1868 & 1869).
- 6 John P. Frank, *Lincoln as a Lawyer* (Urbana: University of Illinois Press, 1961), 160.
- 7 Charles W. Johnson, *Proceedings of the First Three Republican National Conventions, 1856, 1860, and 1864* (Minneapolis, 1893), 149–153.
- 8 Beale, *Bates Diary*, note 80 at 122.
- 9 *Ibid.*, 132; Bates to Browning, June 11, 1860, Justin H. Turner Collection. Illinois State Historical Library, Springfield. Bates’s letter was printed as a broadside by the Republican party and widely distributed.
- 10 Beale, *Bates Diary*, 152.
- 11 *Ibid.*, 153.
- 12 *Ibid.*, 165.
- 13 *Ibid.*, 164.
- 14 *Ibid.*, 228–29.
- 15 *Ibid.*, 213–17.
- 16 *Attorney General Opinions*, X, 427–35.
- 17 Beale, *Bates Diary*, 200.
- 18 *Ibid.*, 220.
- 19 *Attorney General Opinions*, X, 526.
- 20 *Ibid.*, XI, 14.
- 21 *Ibid.*, XI, 108, 113.
- 22 *Ibid.*, X, 11.
- 23 *Ibid.*, XI, 124, 126.
- 24 For example, Charles Lee was Washington’s third Attorney General and Andrew Jackson appointed John Berrien.

- ²⁵ *Attorney General Opinions*, XI, 9, 14.
- ²⁶ *Ibid.*, X, 74.
- ²⁷ *Ibid.*, XI, 1.
- ²⁸ *Ibid.*, XI, 31, 35.
- ²⁹ *Ibid.*, X, 46–48.
- ³⁰ *Ibid.*, X, 50–52.
- ³¹ *Ibid.*, X, 95, 96.
- ³² *Ibid.*, X, 347, 350.
- ³³ U.S. House, *Miscellaneous Documents*, 37th Cong., 1st Sess., 22; U.S. Senate, *Executive Documents*, 37th Cong., 2d Sess., I, 47.
- ³⁴ Dean Sprague, *Freedom Under Lincoln* (Boston: Houghton Mifflin, 1965), 159.
- ³⁵ *Collected Works*, 4:344.
- ³⁶ Frank J. Williams, “Abraham Lincoln and Civil Liberties,” in *Judging Lincoln* (Carbondale: Southern Illinois University Press, 2002), 63–65.
- ³⁷ *Ibid.*
- ³⁸ *Collected Works*, 4:421–441.
- ³⁹ *Attorney General Opinions*, X, 74–92.
- ⁴⁰ *Ibid.*, 91.
- ⁴¹ Frank, *Lincoln as a Lawyer*, 160.
- ⁴² Bates to Francis Lieber, October 8, 1864, Francis Lieber Papers, Huntington Library.
- ⁴³ Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A. Knopf, 1973), 142 & 143.
- ⁴⁴ U.S. *Statutes at Large*, XII, 319.
- ⁴⁵ U.S. *Statutes at Large*, XII, 590–92.
- ⁴⁶ Cain, *Edward Bates of Missouri*, 200–01.
- ⁴⁷ U.S. *Congressional Globe*, 37th Cong., 2d Sess., XXXII, 3379–83; *Collected Works*, 5:328–31, 341; U.S. *Statutes at Large*, 590–92.
- ⁴⁸ Bates to R.J. Lackey, January 19, 1963, Nevins ms. Huntington Library, Bates to Broadhouse, April 15, 1862, Nevins ms. Huntington Library.
- ⁴⁹ Hyman, *A More Perfect Union*, 178.
- ⁵⁰ *Ibid.*
- ⁵¹ *Attorney General Opinions*, X, 382–413.
- ⁵² *Ibid.*, 413.
- ⁵³ *Ibid.*, 389–90.
- ⁵⁴ *Ibid.*, 392–93.
- ⁵⁵ *Ibid.*, 397.
- ⁵⁶ Howard K. Beale, ed., *The Diary of Gideon Welles, Secretary of the Navy Under Lincoln and Johnson*, 3 vols. (New York, 1960), 1:158.
- ⁵⁷ Cain, *Edward Bates of Missouri*, 225.
- ⁵⁸ Beale, *Bates Diary*, 262–64, Bates’s memorandum to the President in support of treaties for colonization.
- ⁵⁹ *Attorney General Opinions*, X, 54–58.
- ⁶⁰ *Ibid.*, XI, 43.
- ⁶¹ *Ibid.*, XI, 45–46.
- ⁶² Tyler Dennett, ed., *Lincoln and the Civil War in the Diaries and Letters of John Hay* (New York: Dodd, Mead & Company, Inc., 1939), 203.
- ⁶³ *Collected Works*, 6:33–34; 7:86.
- ⁶⁴ *Ibid.*, 6:234.
- ⁶⁵ David Herbert Donald, *Lincoln* (New York: Simon & Schuster, 1995), 453.
- ⁶⁶ *Collected Works*, 6:499–504.
- ⁶⁷ *Ibid.*
- ⁶⁸ Edward Bates to Abraham Lincoln, October 22, 1863, Robert Todd Lincoln Collection, Library of Congress.
- ⁶⁹ *Collected Works*, 7:487–88.
- ⁷⁰ John Nicolay and John Hay, *Abraham Lincoln, A History*, 10 vols. (New York: The Century Co., 1917), 9:343–44.
- ⁷¹ Beale, *Bates Diary*, 427.
- ⁷² *Ibid.*, 427–28.
- ⁷³ Bates to Lincoln, November 24, 1864, Robert Todd Lincoln Collection, Library of Congress.
- ⁷⁴ Beale, *Bates Diary*, 428.
- ⁷⁵ *Ibid.*, 429.
- ⁷⁶ *Ibid.*, 279.
- ⁷⁷ F.B. Carpenter, *Six Months at The White House With Abraham Lincoln* (New York: Hurd and Houghton, 1867), 68.
- ⁷⁸ Beale, *Bates Diary*, 473.

